

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

Prohibition of Energy Market Manipulation

Docket No. RM06-3-001

ORDER DENYING REHEARING

(Issued March 22, 2006)

1. Edison Mission Energy, Edison Mission Marketing & Trading, Inc., and Midwest Generation EME, LLC (together, EME), seek rehearing of Order No. 670, which adopted a new rule prohibiting the employment of manipulative or deceptive devices or contrivances in wholesale electricity and natural gas transactions.<sup>1</sup> EME contends the Commission should modify Order No. 670 to adopt a 90-day limitation on complaints or enforcement actions under the new anti-manipulation rule.<sup>2</sup> We deny EME's request for rehearing.

**I. Background**

2. On October 20, 2005, the Commission proposed a new rule to prohibit energy market manipulation by making it unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission, or in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, (1) to use or employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to

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<sup>1</sup> *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006) (Order No. 670). Order No. 670 implemented new section 4A of the Natural Gas Act (NGA) and new section 222 of the Federal Power Act (FPA), as added to the statutes by the Energy Policy Act of 2005 (EPAct 2005). *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), sections 315 and 1283, respectively.

<sup>2</sup> Rehearing request at 1, 7. EME did not file initial or reply comments in Docket No. RM06-3-000, but asserts that it is a member of the Electric Power Supply Association, which did file initial comments in this docket. *Id.* at 6.

omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.<sup>3</sup> Thirty parties filed comments and nine parties filed reply comments.<sup>4</sup>

3. On January 19, 2006, in Order No. 670, the Commission adopted the anti-manipulation rule substantially as proposed in the NOPR by adding a new part 1c to the Commission's regulations.<sup>5</sup> The Commission did, however, provide clarifications requested by several commenters. Among other things, the Commission clarified the scope of application of the new rule; addressed comments pertaining to disclosure and subparagraphs (a)(2) and (a)(3) of the anti-manipulation rule; discussed the elements of a violation of the rule; noted the relationship of the anti-manipulation rule to the Market Behavior Rules; and dealt with a number of implementation issues, including the statute of limitations, affirmative defenses and safe harbor provisions, and other procedural matters.

## **II. Request for Rehearing**

4. EME argues that the Commission should use the 90-day limit on complaints or enforcement actions that had been in effect under the Market Behavior Rules.<sup>6</sup> EME also contends that the Commission erred by failing to provide notice of intent to alter the time

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<sup>3</sup> *Prohibition of Energy Market Manipulation*, Notice of Proposed Rulemaking, 113 FERC ¶ 61,067 (2005) (NOPR).

<sup>4</sup> Order No. 670 at P 3 and Appendix.

<sup>5</sup> *Id.* at P 4. The Commission changed the wording of the proposed regulatory text in only one respect: substituting "entity" for "person" in sections 1c.1(a)(3) and 1c.2(a)(3) of the regulations. *Id.* at P 76.

<sup>6</sup> *Order Amending Market-Based Rate Tariffs and Authorizations*, 105 FERC ¶ 61,218 (2003), *reh'g denied* 107 FERC ¶ 61,175 (2004). Under the Market Behavior Rules, a complaint had to be brought within 90 days from the end of the calendar quarter in which the violation was alleged to have occurred, unless a complainant could show that it did not know and should not have known of the behavior which forms the basis for its complaint within this time period. Both Market Behavior Rule 2 prohibiting manipulation and the 90-day time limit were rescinded effective February 27, 2006. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 (2006).

limitations applicable to market manipulation, provide an opportunity for EME and other parties to respond, or provide a sufficient basis for altering the time limitations.<sup>7</sup> EME says that if it had known the Commission might change the time limits, EME would have opposed a five-year period, and instead would have proposed that the Commission use the 90-day limitation for actions arising under the Market Behavior Rules.<sup>8</sup> EME urges the Commission to grant rehearing, and to use the pre-existing 90-day limitation that applied to actions brought under the Commission's now rescinded Market Behavior Rules.<sup>9</sup>

5. EME argues that the Commission's rationale for placing a 90-day time limitation on actions brought under the former Market Behavior Rules should also apply to actions brought under new part 1c of the Commission's regulations.<sup>10</sup> EME also argues that the Commission failed to provide a rationale for changing to a five-year period.<sup>11</sup> EME suggests that, at the very least, the Commission should adopt a one-year limitation, referring to the securities context under Securities and Exchange Commission (SEC) Rule 10b-5.<sup>12</sup> EME further argues that the Commission should adopt a limitation on actions that is at least within the bounds of all regulations governing the retention of records upon which an action for market manipulation would be likely based and that apply to entities with market-based rate authority.<sup>13</sup> EME also suggests the Commission hold a technical conference on market manipulation issues following final action on the Market Behavior Rules and associated issues.<sup>14</sup>

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<sup>7</sup> Rehearing request at 1, 5.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 2; *see* n.6, *supra*.

<sup>10</sup> Rehearing request at 7.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> *Id.* at 9. As discussed in P 8 below, EME confuses the statute of limitations applicable to private rights of action under SEC Rule 10b-5 with actions brought by the SEC pursuant to its enforcement authority.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 10.

### **III. Discussion**

6. The Commission denies EME's request for rehearing. First, EME incorrectly claims that the Commission "adopted" a five-year statute of limitations for actions brought under part 1c. To the contrary, we explicitly said that the "Commission declines to designate a statute of limitations or otherwise adopt an arbitrary time limitation on complaints or enforcement actions that may arise under NGA section 4A and FPA section 222."<sup>15</sup> Rather, we stated that because section 4A and section 222 are silent as to a statute of limitations, and no statute of limitations of general applicability appears in the NGA or FPA, the Commission is limited by the five-year statute of limitations found in 28 U.S.C. § 2462 that applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture . . . ."<sup>16</sup> Because no statute of limitations is directly applicable to the new anti-manipulation rule, the Commission is limited only by the already existing law, 28 U.S.C. § 2462, in instances where we seek civil penalties for violations of part 1c.<sup>17</sup>

7. Second, EME incorrectly states that in Order No. 670, the Commission altered the time limitations applicable to violations of the market manipulation rules.<sup>18</sup> This is not the case. In promulgating part 1c, the Commission was acting pursuant to new authority the Congress granted the Commission in EPAct 2005. Unlike the Market Behavior Rules, which were incorporated into the tariffs of holders of electric market-based rate authority as a condition of using such authority,<sup>19</sup> part 1c of the Commission's general regulations were promulgated pursuant to explicit statutory anti-manipulation authority. EME overlooks the fact that the anti-manipulation rule is a new rule, completely independent of the Market Behavior Rules. As such, the time limitation used in the

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<sup>15</sup> Order No. 670 at P 62.

<sup>16</sup> 28 U.S.C. § 2462 (2000).

<sup>17</sup> The NOPR also gave notice that, because the Commission's new anti-manipulation authority is patterned after the securities law, the Commission intends to rely on analogous SEC precedent where appropriate, which would include precedent on the issue of time limits for bringing enforcement actions under the new anti-manipulation rule. NOPR at P 10-14.

<sup>18</sup> Rehearing request at 1, 5.

<sup>19</sup> For natural gas, the analogous market rules were codified in sections 284.288(d)-(e) and 284.403(d)-(e) of the Commission's regulations.

Market Behavior Rules is irrelevant for determining the appropriate time limitation for actions under the new anti-manipulation rule.

8. EME is also mistaken that the Commission's discussion of the statute of limitations question in Order No. 670 is beyond the scope of the proposed rule. The Commission provided ample notice of the proposed rule and adopted it substantially as proposed, so there is no basis for EME's claim that we changed the rule in a way that had not been proposed.<sup>20</sup> More to the point, other parties commented on the time limitation appropriate for the new rule, including one party that specifically urged use of the 90-day period EME now advocates.<sup>21</sup> Accordingly, EME was on notice that the issue had been raised and had the opportunity to make its views known to the Commission in reply comments, had it so chosen.

9. In arguing in the alternative for a one-year statute of limitations, EME confuses the statute of limitations that applies to private rights of action under SEC Rule 10b-5 with actions brought by the SEC pursuant to its enforcement authority. With respect to the latter, the courts have ruled that the SEC is not bound by any statute of limitations when it brings a Rule 10b-5 civil enforcement action.<sup>22</sup> Rather, the five-year statute of limitations in 28 U.S.C. § 2462 applies to civil enforcement actions brought by the SEC seeking civil penalties under Rule 10b-5.<sup>23</sup> Similarly, 28 U.S.C. § 2462 applies to civil enforcement actions brought by the Commission seeking civil penalties under part 1c. As noted in Order No. 670, we will exercise prosecutorial discretion in determining whether

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<sup>20</sup> Rehearing request at 6-7. *See Revisions to Uniform Systems of Accounts, Forms, Statements, and Reporting Requirements for Natural Gas Companies*, Order No. 581-A, FERC Stats. & Regs. ¶ 31,032, at 31,547-49 (1996) (notice is adequate when interested parties have an opportunity to comment and rule as adopted is in character with the proposed rule).

<sup>21</sup> Order No. 670 at P 61; *see* Order No. 581-A, *supra*, at 31,549.

<sup>22</sup> *SEC v. Rind*, 991 F.2d 1486, 1491-92 (9th Cir. 1993). The one-year statute of limitations cited by EME applies only to private rights of action under Securities Exchange Act section 10b and SEC Rule 10b-5. 15 U.S.C. § 78i(e). The Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, § 804(a), 116 Stat. 745, 801 (2002) (codified at 28 U.S.C. § 1658), extended the limitations period to two years, but applies only to private fraud claims arising on or after July 30, 2002. In contrast, Congress specifically prohibited private rights of action under NGA section 4A and FPA section 222.

<sup>23</sup> *Johnson v. SEC*, 87 F.3d 484, 491-92 (D.C. Cir. 1996).

to pursue an alleged violation based on all the facts presented, including the time elapsed since the violation is alleged to have occurred.<sup>24</sup>

10. Finally, the Commission rejects EME's request for a technical conference as unnecessary. The Commission commenced this proceeding five months ago, and provided ample opportunity for the public to participate. EME, which chose not to participate directly, is now the only party seeking rehearing or asking for a technical conference. The Commission sees no reason to expend the agency's or the industry's resources to hold a conference. In our view, Order No. 670 provides the industry with adequate guidance as to how the new anti-manipulation rule will operate.

The Commission orders:

EME's request for rehearing of Order No. 670 is denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>24</sup> Order No. 670 at PP 62-63.